



right elbow ulnar neuropathy and authorized right carpal tunnel release surgery, which was performed on January 30, 2002.<sup>1</sup> It also accepted appellant's claim for post-traumatic stress disorder and adjustment disorder with depressed mood.

On August 8, 2006 Dr. David L. Rubenstein, an attending Board-certified orthopedic surgeon, diagnosed bilateral rotator cuff impingement syndrome and associated degenerative arthritis. On October 10, 2006 he informed the Office that appellant was scheduled for left shoulder surgery consisting of repair of the rotator cuff tear and subacromial decompression and debridement on October 23, 2006. Dr. Rubenstein requested authorization to perform the surgery.

On October 12, 2006 the Office received a September 28, 2006 report from Dr. Richard J. Mandel, a second opinion Board-certified Board orthopedic surgeon with a subspecialty in hand surgery who opined that appellant had recovered from her accepted thoracic, lumbosacral and cervical strains and her lumbar neuritis/radiculitis. Dr. Mandel advised that her ongoing pain complaints, generalized joint stiffness and peripheral edema were unrelated to her accepted employment injuries. He noted possible causes of her shoulder condition were inflammatory disease, hypothyroidism, osteoarthritis and rotator cuff pathology, all unrelated to her accepted conditions. On November 21, 2006 Dr. Mandel reiterated that appellant's bilateral rotator cuff pathology and osteoarthritis were unrelated to her accepted claim.

On January 2, 2007 Dr. Rubenstein reviewed appellant's medical records dating back to 2001. He noted that, while no specific diagnosis of a rotator cuff problem was of record, there were indications that appellant experienced pain in the shoulder area. Dr. Rubenstein stated that he could not "exclude that she experienced bilateral shoulder injuries as there is a -- suggestion in the medical records for the affirmative."

The Office found a conflict in medical opinion between Dr. Rubenstein and Dr. Mandel.

The record reflects the Office bypassed various physicians from being selected as an impartial medical examiner. They included, Dr. Paul Lotke, Dr. Scott Kozin, Dr. John Kelly, Dr. Marvin Kallish, Dr. William Markmann, Dr. G. Macewen and Dr. Jess Lonner, Board-certified orthopedic surgeons. The bypass notes for Drs. Lonner and Lotke noted that they had moved. The Office requested removal of the Drs. Kallish, Kelly, Kozin and Macewen for reasons such as no answer or machine, no impartial medical examiner appointment or children's physician. As to Dr. Markmann, the bypass notes stated: "Dr. Markmann is being set up to do [impartial examination] however another [doctor] in the office will do this app[ointment], Dr. Dearolf."

On February 21, 2007 the Office referred appellant together with a statement of accepted facts and the medical record, to Dr. Walter W. Dearolf, III, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In an April 27, 2007 report, Dr. Dearolf reviewed her history of injury and treatment and performed a physical examination. He addressed appellant's

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<sup>1</sup> This was assigned claim file number xxxxxx817. Under claim file number xxxxxx364 the Office accepted that appellant sustained a mild concussion and aggravation of a neck strain due to a July 17, 2001 employment injury.

medical injury and noted pain surgery for carpal tunnel release with elbow nerve decompression. Dr. Dearolf stated that her shoulder complaints currently were based on her glenohumeral degenerative disease, which was unrelated to her federal employment or accepted conditions.

By decision dated May 14, 2007, the Office denied authorization for left shoulder surgery. It found that Dr. Dearolf's opinion was rationalized and did not support that the proposed surgery was likely to cure, give relief or reduce the degree or the period of the disability.

Appellant requested an oral hearing before an Office hearing representative. By decision dated July 31, 2007, the Office hearing representative set aside the May 14, 2007 decision. He found that Dr. Dearolf's report was insufficiently rationalized to constitute the weight of the medical evidence. The case was remanded for the Office to obtain a supplement report from the physician.

In a July 31, 2007 report, Dr. Dearolf reiterated his opinion that appellant's bilateral shoulder problems were unrelated to the accepted employment injury.

By decision dated August 30, 2007, the Office denied authorization for the proposed left shoulder surgical procedure.

Appellant requested an oral hearing before an Office hearing representative, which was held on January 17, 2008. At the hearing, she contended that Dr. Dearolf did not perform any physical examination and informed her he was relying on the medical reports. Counsel contended that Dr. Dearolf was not properly selected as an impartial medical examiner based on a review of the bypass sheets, which identified Dr. Markmann as being selected, but that Dr. Dearolf would perform the examination.

By decision dated January 29, 2009, the Office hearing representative affirmed the denial of authorization for the requested left shoulder surgery.

### **LEGAL PRECEDENT**

Section 8103 of the Federal Employees' Compensation Act<sup>2</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>3</sup> The Office has the general objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. The only limitation on the Office's authority is that of reasonableness.<sup>4</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8103; *see also* *L.D.*, 59 ECAB \_\_\_\_ (Docket No. 08-966, issued July 17, 2008).

<sup>4</sup> *A.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-580, issued January 28, 2009); *L.W.*, 59 ECAB \_\_\_\_ (Docket No. 07-1346, issued April 23, 2008); *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>5</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.<sup>7</sup>

Office procedures further provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the Physician's Directory System (PDS) should be used for this purpose.<sup>8</sup>

### ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome, bilateral cubital syndrome, right elbow ulnar neuropathy and post-traumatic stress disorder with depressed mood. It referred appellant to Dr. Dearolf, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Rubenstein, appellant's attending physician, and Dr. Mandel, the second opinion medical specialist, as to whether the proposed left shoulder surgery should be authorized.

On appeal, appellant's counsel contends that the Office did not follow proper procedures in scheduling the impartial medical examination. The Board finds that the evidence of record supports her contention. There are no notes in the PDS explaining the referral to Dr. Dearolf, who is only mentioned in the bypass notes for Dr. Markmann. It appears that Dr. Markmann was actually selected to perform the impartial examination, but that Dr. Dearolf would be performing the actual examination.

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<sup>5</sup> 5 U.S.C. § 8123(a); *see S.T.*, 60 ECAB \_\_\_\_ (Docket No. 08-1675, issued May 4, 2009).

<sup>6</sup> *B.P.*, 60 ECAB \_\_\_\_ (Docket No. 08-1457, issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>7</sup> *Charles M. David*, 48 ECAB 543 (1997).

<sup>8</sup> *B.P.*, *supra* note 6.

The Office's procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.<sup>9</sup> The record reveals that Dr. Markmann was selected by the Office according to the bypass notes. Although Dr. Dearolf is in the same office as Dr. Markmann, the Board notes that the record does not demonstrate that Dr. Dearolf would have been the next physician on the rotation list after Dr. Markmann. Therefore, to permit the use of Dr. Dearolf's medical opinion would undermine the appearance of impartiality and compromise the integrity of the system for selecting impartial medical specialists.<sup>10</sup> The Office improperly relied on Dr. Dearolf to resolve the conflict in the medical opinion evidence. There is an unresolved conflict regarding whether the left shoulder surgery should be authorized.

### CONCLUSION

The Board finds that there is an unresolved conflict in the medical opinion evidence. The Office failed to follow established procedures for selection of the impartial medical examiner.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(a)(3) (March 1994).

<sup>10</sup> See *Shirley L. Steib*, 46 ECAB 309 (1994) (where an associate of the physician selected by the Office to serve as an impartial medical specialist examined the claimant and provided an opinion, the Board found that the associate's opinion could not constitute the weight of the medical evidence as the associate was not selected as an impartial specialist according to Office procedures); *Vernon E. Gaskins*, 39 ECAB 746 (1988); *William C. Iadipaolo*, 39 EAB 530 (1988); *Leonard W. Waggoner*, 37 ECB 676 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 29, 2009 be set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 13, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board